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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 79 and 94

ROBERT L. PIERSON, *et al.*,

Petitioners,

—v.—

J. L. RAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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ARGUMENT:

- I. A police justice, who knowingly and intentionally acts individually and in concert with the police to punish persons for exercising their constitutional rights, to enforce segregation laws, customs and usages, and to con-

vict persons under a statute of whose violation there was no evidence, is not immune from liability in damages under 42 U. S. C. §1983, which applies, without exception, to "every person", that was said by the Congress that enacted it to apply to such conduct by such judges, and that was intended to create a remedy for sham justice in the courts

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II. All that there was by way of "plan and purpose" to be arrested was foreknowledge that traveling as an integrated group might illegally subject the ministers to arrest. State officials who act under color of state law to deprive persons of their constitutional rights are not freed from liability under 42 U. S. C. §1983 by showing that those persons know that they might be arrested for traveling as an integrated group but nevertheless exercised their constitutional right to do so

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III. A directed verdict on the issue of liability under 42 U. S. C. §1983 should be entered against the policemen defendants

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IV. The evidence that the police used the "disorderly conduct" statute as a sham basis for the arrest, the real aim of which was to preserve segregation, was strong. The court below, therefore, erred in dismissing the diversity cause of action

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Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 352 F. 2d 213.

The District Court for the Southern District of Mississippi, Jackson Division, wrote no opinion. Its judgment and order is at R. 440-442.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on October 25, 1965. On January 21, 1966, by Order of Mr. Justice Black, the time within which to file a petition was extended to and including February 24, 1966, and by Order of Mr. Justice Black on that day further extended until February 28, 1966. The petition in Number 79 was filed on February 28, 1966. Respondents opposed the granting of certiorari but stated that if petitioners' petition was granted this Court should also review a question raised by respondents as to the meaning of the opinion of the Fifth Circuit. The Court granted both petitions and consolidated the cases on May 16, 1966, 384 U. S. 939. The jurisdiction of this Court rests on 28 U. S. C. §1254(1).

Statute Involved

The statute involved is Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. §1983.

As printed in Title 42, the Section reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

Proceedings Below

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, Jackson Division, against three policemen and one police justice of Jackson, Mississippi.* The suit was for damages under (a) 28 U. S. C. §1343 alleging a cause of action under 42 U. S. C. §1983 and (b) 28 U. S. C. §1332 alleging diversity of citizenship and a cause of action for false arrest and imprisonment under Mississippi law. Judgments in favor of defendants-respondents were entered by Judge Mize upon a jury verdict.

Upon appeal, the Fifth Circuit (1) reversed the judgment as to the policemen with respect to the federal cause of action under 42 U. S. C. §1983 but remanded with instructions that plaintiffs should not be permitted to recover if they knowingly planned to go to a place where travelling as an integrated group would subject them to illegal arrest, (2) directed that the state law cause of action against the policemen should be dismissed and (3) held that the police justice was immune from suit under both causes of action and directed that the complaint against him should be dismissed.

*In addition to the persons named in the caption, there are the following additional petitioners and respondents: *Petitioners*: James P. Breeden, James G. Jones, Jr. and John B. Morris; *Respondents*: Joseph D. Griffith and David A. Nichols (both along with J. L. Ray members of the Police Department of the City of Jackson, Mississippi) and James L. Spencer, Police Justice of Jackson, Mississippi.

Questions Presented

1. Whether a municipal police justice (a) alleged to have acted individually and conspired with police officers to have white and Negro ministers arrested, convicted and sentenced to jail for the sole purpose of enforcing the segregation laws, customs, or usages of the State of Mississippi, and (b) whose conviction of the ministers for congregating in an orderly fashion but under such circumstances that other persons might cause a breach of the peace was subsequently reversed at a trial *de novo* at the close of the prosecution's case on the ground that there was no evidence against the ministers, is immune from a suit for damages under 42 U. S. C. §1983, which (1) without exception makes liable in damages "every" person who deprives another person of his constitutional or other federal rights under color of state law, etc., and (2) was intended by the Congress that enacted it to apply to such conduct by such judges.

2. Whether proof that a group of Negro and white ministers chose to exercise their constitutional right to travel together in interstate commerce knowing that doing so might subject them to illegal arrest renders policemen who illegally arrested them free from liability in damages under 42 U. S. C. §1983 even if it is shown that:

(a) the arrest was in fact made to enforce the segregation laws, customs or usages of the State of Mississippi pursuant to which the bus terminal waiting room in which the ministers were arrested had never been entered by a Negro without his being arrested and was marked "white waiting room only—by Order of the Police Department";

(b) the persons arrested were completely orderly;

(c) the statute that purportedly was used to justify the arrests made guilty of "disorderly conduct" persons who congregate with others in a public place "under circumstances such that a breach of the peace might be occasioned thereby" and who refuse to move on upon request of a law enforcement officer;

(d) it was subsequently held at a trial *de novo* of the ministers that there was no evidence under that statute against them; and

(e) that statute was subsequently in another case held unconstitutional on its face by this Court.

3. Whether under the circumstances set forth in the preceding question the persons arrested are entitled to a directed verdict against the arresting officers on the issue of liability under 42 U. S. C. §1983.

4. Whether, assuming that under Mississippi law, applicable in the diversity cause of action, the police officers are not liable in damages for false arrest on the ground that they made an arrest under a "disorderly conduct" statute which was subsequently declared unconstitutional, the police officers would not nevertheless be liable if (a) the arrest was in fact made to enforce the segregation laws, customs and usages of Mississippi or (b) there was no cause to believe (as the trial *de novo* suggests) that the "disorderly conduct" statute had been violated.

Statement

A. Petitioners' Arrest and Confinement.

Petitioners are three white and one Negro Episcopal clergymen.* As members of a "Prayer Pilgrimage" they sought, in September 1961, to visit church institutions in both the South and the North from New Orleans to Detroit (where they expected to report to their church convention) and to deliver and dramatize their "message to the Church that the Church must become, in every phase of its life, that which by the grace of God it is—one Holy Fellowship where racial barriers have been done away" (Defendants' Exhibit No. 1, R. 90).

On September 13, 1961, the clergymen arrived in Jackson, Mississippi, planning to take a Continental Trailways bus scheduled to leave shortly after noon the next day for Chattanooga, Tennessee. At approximately 11:30 a.m., petitioners and eleven other Episcopal clergymen (nine white, two Negro), all dressed in clerical garb, arrived at the Jackson Trailways Bus Terminal in three taxis from Tougaloo College where they had spent the previous night (R. 59-60, 121-122, 256-257, 319-320). While it was known that they had arrived in Jackson, no one had been advised at what time they would leave, and no crowd was present in the station at the time they arrived.

The entrance to the terminal waiting room was marked "White Waiting Room Only—By Order of the Police Department" (R. 338-339, 181-186, 358-359). As they passed the "white only" sign the ministers entered the waiting room and turned left to go into a small bus station restau-

* Pierson, Jones and Morris are white. Breeden is a Negro.

rant. No more than four or five had passed through the restaurant doors, when defendants Griffith and Nichols, Jackson police officers who had been waiting for the group to arrive,* ordered the group to "hold it" or "come out" (R. 60-62, 122-124, 257-258, 319-320, 375-376).

Gathered together in the waiting room, outside the restaurant, the ministers were ordered by the police officers to "move along". Replying that they only wanted to eat, they asked why they could not do so. No reply came from the police except again "move on". Not doing so, the entire group of Episcopal ministers was arrested (R. 63-64, 125-126, 259, 320).

Respondent Ray, then captain, now deputy chief of the Jackson police, arrived a few minutes later.** Without speaking to Nichols or Griffith, nor to anyone else in the station, he walked directly to the ministers: without ado he ordered them to move along. When they did not do so but explained that they were hungry and wished to eat before their bus departed, he also placed them under arrest, put them in the waiting paddy wagon and sent them to jail (R. 400, 66-67, 126-128, 252-261, 321-322).

The court below stated that the "prayer pilgrims were completely orderly" (352 F. 2d at 216; R. 445). The arresting officers conceded that the ministers were orderly and quiet (R. 349-350, 400-401, 410). Petitioners testified that (1) no one followed them into the station, (2) the

* Petitioner Jones testified that as the ministers passed the two police officers standing at the entrance to the waiting room he heard one of them say "shall we get them now or later" (R. 61).

** Nichols had left the ministers in charge of Griffith in order to telephone headquarters. Nichols talked to Chief Pierce only to discover that Ray had already left for the terminal (R. 409).

waiting room was quiet and (3) no one in it threatened them by word or gesture (R. 62-65, 121, 124-128, 257, 258-260, 319, 321-323). That testimony was confirmed by Father Layton P. Zimmer, a fellow Episcopal priest who was in the station in nonclerical garb and who observed Petitioners' arrest (R. 376-378). Led by one of them, the arrested ministers recited the Lord's Prayer; persons in the terminal joined in (R. 64-65, 377).

A "crowd" followed them into the station in an "ugly" mood, they feared that the ministers might be attacked, was the explanation of the police (R. 342-343, 395-397, 406-407, 413-420).^{*} But when pressed about the crowd and its ugly mood, Officer Griffith conceded that "I just noticed maybe two or three of them mumbling, kind of saw them jabbering a little to each other . . . off at a distance, something like that" (R. 343, 420).^{**} Furthermore, there was no evidence whatsoever that any hostile persons were in the restaurant, which the police prevented the ministers from entering.

The police conceded that they made no effort whatsoever to arrest the persons whom they claimed were in an ugly mood (or mumbling at a distance).[†] Nor did they ask such persons to leave, or even say a word to them or caution or calm them in any way (R. 342, 401-402, 419-420). Far from

^{*} The police testimony was not supported by any independent witnesses from among employees of the bus terminal or bystanders.

^{**} Similarly, Officer Nichols admitted that he did not mention any ugly mood when he left the ministers alone with Griffith and went to telephone the police station to obtain defendant Ray, an act hardly consistent with fear of a disturbance (R. 339).

[†] The police never testified how many such persons there were. The only police testimony on the number of persons in the station was that 12 to 15 had been there prior to the arrival of the ministers and 20 to 25 followed the ministers in.

contending that it would have been difficult to control those who were in an ugly mood (or mumbling), the police said that they didn't even ask any such persons to leave because the ministers, by their presence, "was the cause of the violence if any might occur" (R. 347). Nor did the police ever tell the ministers that they were being arrested because others might attack them.

That the real aim of the police was to enforce segregation customs and laws is also suggested by the police testimony (1) that it was wrong for whites and Negroes to be together in bus stations or anywhere (R. 335-336, 347); (2) that a Negro had never gone into that part of the station and not been arrested (R. 345), (3) that "if [the ministers] did it again today" they would again arrest them (without any reference to a supposed ugly crowd) (R. 340).. The police "white only" sign outside the waiting room also pointed to the intention to deny Negroes the right to enter the station.

B. Petitioners' Conviction by Police Justice Spencer.

Two days after their arrest, remaining in jail during that time, petitioners were tried by defendant Spencer, a police justice serving at the pleasure of the Mayor of Jackson (R. 183). Petitioners were tried upon a "General Affidavit", in which defendant Ray had said that they

"... with intent to provoke a breach of the peace, did then and there willfully and unlawfully congregate with others in or around . . . a place of business engaged in selling or serving members of the public, and did then and there fail or refuse to disperse and move on as then ordered to do so by affiant, a law enforcement officer of the City of Jackson, Mississippi, a

municipality, contrary to the laws and ordinances in such cases made and provided, and against the peace and dignity of the State of Mississippi" (R. 73-75, 159, 267).

Seven months after petitioners' convictions, the prosecution sought and obtained leave to amend the affidavit in respect of the three white petitioners (Pierson, Morris and Jones). The changes of substance were (1) striking the words "with intent to provoke a breach of the peace, did then and there willfully and unlawfully" and substituting "under such circumstances that a breach of the peace might be occasioned thereby, did then and there" and (2) adding the words "willfully and unlawfully" prior to the words "fail or refuse" (R. 80-82, 159, 267).*

The affidavit in its original and its amended form tracked the terms of Section 2087.5 of the Mississippi Code, enacted in 1960. In a case, not dissimilar to that of petitioners, which also arose from Police Justice Spencer's court, *Thomas v. Mississippi*, 380 U. S. 564 (1965), Section 2087.5 was declared unconstitutional. Cf. *Brown v. Louisiana*, 383 U. S. 131 (1966); *Cox v. Louisiana*, 379 U. S. 536, 547, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229 (1963).

Defendant Spencer convicted Petitioners of violating that statute and sentenced them to the maximum sentence—four months in jail and \$200 fine.

Admitting that there had been no evidence that Petitioners were disorderly in any way (R. 352-353), defendant Spencer acknowledged (in a portion of his deposition that the trial court excluded from evidence) that he had

* In addition, "disperse" was substituted for "disburse".

assumed a person was never entitled to decline to obey an order of a police officer, no matter how improper, and that he had never researched the law on the subject (R. 356). Instead, at petitioners' trial, he had ready at his hand and upon completion of the testimony, read to them an article of religion from the Episcopal Book of Common Prayer dealing with the duty of priests to obey civil authorities; then he gave his judgment that petitioners were "guilty" of violating that article (R. 366-371).

Each respondent individually, and respondents together, i.e., Judge Spencer and the policemen, were alleged by the complaint to have had persons arrested and convicted for violating the segregation laws, customs, policies and usages of the State of Mississippi (R. 5). Judge Mize refused to permit questioning of Police Justice Spencer designed to establish Spencer's role in the alleged conspiracy (R. 352-371). His relationship to the various cases encompassed in *Thomas, supra*, and to Chief, then Captain, Ray, who made most of the arrests therein, could not be shown.

Police Justice Spencer had tried almost all the cases (some 50 trials and 300 defendants) which had previously arisen out of the efforts of integrated groups to use the Jackson bus terminal (R. 356-357).

C. *The Subsequent Decision at a Trial de Novo That There Was No Evidence Against Petitioners.*

Petitioners' convictions were vacated after the prosecution had put in its evidence at trials *de novo* in the County Court of Hinds County. Petitioner Jones was the first to be retried. After the City offered its evidence, Jones moved for a directed verdict of not guilty; the County Judge granted the motion since the City showed no violation of the statute (R. 333-334). The County Court then

granted the prosecutor's motion to nol. pros. the cases against Morris, Breeden* and Pierson on the grounds that the evidence against them was the same as the evidence against Jones (R. 155-156, 164, 272):

D. *The Trial and Appeal of This Action.*

The jury found for respondents after the trial court over objection of counsel had permitted petitioners to be examined about the following matters amongst others:

1. Whether they agreed with the Communist Party's race relations program as set forth in the *Daily Worker* of May 26, 1928 (R. 105-111);

2. Whether they believed in the abolition of all laws prohibiting intermarriage of persons of the Caucasian and Negro races (R. 285-286, 108);

3. Whether they supported the "Freedom Ride Invasion" of Jackson (R. 214-219) and whether they supported the purposes and activities of those groups that call themselves Freedom Riders (R. 97-102, 149-170, 174-175, 180, 243, 278, 279, 281, 282-283);

4. Whether their attorneys in Police Justice Spencer's court had previously represented many Freedom Riders (R. 287);

5. Whether their trial counsel was the general counsel of the Congress of Racial Equality (CORE) (R. 287-288, 152-153, 215-216); and

* In an unimportant manner the record is incorrect as to Petitioner Breeden, who also received a nul pros, although the record indicates a motion to dismiss granted (R. 333). Breeden was not tried on April 9, 1962, and thereafter the Ray affidavit was amended before the Jones Trial to its present form.

in-Law of Governor Rockefeller as 'Freedom Rider' " (R. 291-292).

6. Whether petitioner Pierson had suggested any corrections in a magazine article that had referred to a New York newspaper headline stating "Arrest Son-

In addition, Judge Mize permitted nine letters written by petitioner Morris to prospective and actual members of the Prayer Pilgrimage to be introduced and extensively used in cross-examination concerning the beliefs of Father Morris and the aims of the Prayer Pilgrimage (R. 167-182, 187-247). (See footnote at p. 27 *infra*.)

On the basis of the letters, the defense contended (1) that the ministers knew that travelling as an integrated group might subject them to arrest and jailing and (2) that the ministers prepared for the possibility that some of their members would be arrested and jailed.

On appeal, the Fifth Circuit Court of Appeals held the following:

A. *Policemen Defendants*:

1. The judgment in their favor in the civil rights cause of action, 42 U. S. C. §1983, should be reversed because the trial court permitted questions dealing with petitioners' views on race as compared with (1) the *Daily Worker* of May 26, 1928, and (2) the Freedom Riders with whom, said the court, no connection was shown.

2. Petitioners would normally be entitled to a directed verdict on the issue of liability in the civil rights cause of action because the arrests were improper *but* the case should be remanded for a hearing on the merits because recovery would be precluded if

it were shown that petitioners planned to go to places where their orderly travelling as an integrated group might subject them to arrest.

3. Without regard to the reasons for which they made the arrests or the circumstances existing at the time of the arrests, the policemen were immune from liability under the diversity cause of action for false arrest because the statute under which they purported to arrest petitioners had not yet been held unconstitutional.

B. *Police Justice Spencer* was immune from liability under both causes of action on the ground that he was a judicial officer. The complaint against him should therefore be dismissed.

Summary of Argument

A. In their cross-petition respondents did not contend that the Fifth Circuit erred in reversing the decision of the district court on the ground that improper questions (e.g., whether petitioners agreed with the views on race relations of a May 1928 issue of the *Daily Worker*, etc. as stated above) had been asked. The dispute between the parties relates to the terms of the Fifth Circuit's remand.

B. It was error to hold that Police Justice Spencer was immune from suit under 42 U. S. C. §1983, despite the allegations and the proof (limited as it was by the trial court's exclusionary rulings) that he knowingly and intentionally acted individually and in concert with the police to punish petitioners for exercising their constitutional rights, and to enforce the segregation laws, customs and usages of Mississippi.

Providing for no immunities, the statute applies to "every" person who acts under color of state law to deprive other persons of their constitutional rights. Members of Congress who opposed the statute did so specifically on the ground that it would subject judges to liability. Others, who sponsored and supported the statute, said they did so in part because they were shocked at the defiance of law by racist judges. From the legislative history we read that Congress intended a state judge, just as any other person, who knowingly and maliciously uses his office to deprive persons of their civil rights, to be liable.

The only court to consider even a portion of that legislative history so held. *Picking v. Pa. R. Co.*, 151 F. 2d 240 (3rd Cir. 1945).

This Court's decision in *Tenney v. Brandhove*, 341 U. S. 367 (1951), holding that state legislators are immune from suit under the predecessor of Section 1983, even should it be regarded as correct, does not control the application of the statute to judges. On its face, the statute applies to those who *act* under color of law, not those who *enact* laws. Congress was aware of the distinction (so were the framers of the United States Constitution, which provides for a legislative but not a judicial immunity).

C. It was also error to hold that, even though defendants did illegally deprive the ministers of their rights under color of state law, defendants would nevertheless be free from liability under 42 U. S. C. §1983 upon a showing that the ministers went to Jackson with a "plan and purpose of being arrested and jailed." 352 F. 2d at 220.

The ministers *did* nothing to initiate their arrest and jailing other than to enter the white waiting room as an integrated group. Their orderly conduct has not been dis-

puted. That they had foreknowledge that traveling as an integrated group might subject them to arrest, and knowing this that they chose nevertheless to exercise their Christian duty and constitutional rights to so travel, this is the extent of their "plan and purpose". If, thereafter, they are in fact arrested, illegally, and suffer harm thereby, does the policeman who arrested them escape liability because he was sufficiently contemptuous of the Constitution to make known in advance his intention to act illegally? Would the angry Congress that enacted the Civil Rights Act of 1871 have intended to free the open and notorious law breaker from liability? What other intent did the 1871 Congress have but to hold liable those officials who defied Federal law, and whose known official lawlessness was directed against loyal whites and all blacks? And Congress created a damage remedy.

D. Assuming the court below to be correct in holding that it is the law in Mississippi (contrary to most jurisdictions) that a policeman is free from liability for false arrest for making an arrest under a statute subsequently held unconstitutional, it was error to hold that the diversity cause of action against the policeman should be dismissed. In the first place, a question exists whether the subsequent holding in the trial *de novo* that there was no evidence against the ministers under the "disorderly conduct" statute renders the police liable without further inquiry. Freeing the petitioners, the *de novo* trial was not concerned with the constitutionality of the statute but simply with the total failure of proof. Thus, the issue does not arise of the liability of police officers for arrests under a statute subsequently declared unconstitutional but of not making out a case. On this point we urge that petitioners should have had a directed verdict as requested at the trial,

or at least a new trial at which petitioners can prove the illegal nature of the arrests.

That their real aim was to preserve the segregated waiting room, in which any Negro who entered was arrested, can be seen from the police testimony itself. No threats from others present in the waiting room can be inferred from any credible testimony. To the contrary, weak as it was and conflicting, the police testimony was reduced under pressure to statements that a few unspecified persons were mumbling. No effort whatsoever to calm or restrain such alleged, but not identified persons was made by the police. Indeed, it was the police who kept the ministers from being separated from whatever few mumblers or glarers there were. The police stopped the ministers from entering a restaurant though they could have excluded those who were supposedly hostile to the ministers. There was no evidence that any threat to the peace would have arisen in the restaurant.

The evidence that the police used the "disorderly conduct" statute as a sham basis for the arrests, that their real aim was to preserve segregation, that they did not act in good faith, is strong. Painted on the sign outside, the police order made the room a "white waiting room only". See *Boynton v. Virginia*, 364 U. S. 454 (1960); *Morgan v. Virginia*, 328 U. S. 373 (1946). It was held at the criminal trial *de novo*, after all, that there was no evidence under the "disorderly conduct" statute under which the arrests were purportedly made. Couple this with the views of all respondents in support of segregation and the real purpose of the arrests is made clear.

E. A directed verdict on the issue of liability under 42 U. S. C. §1983 should be entered against the policemen defendants.

The fact that the statute under which the arrests were purportedly made was unconstitutional on its face is sufficient to require a directed verdict against the policemen even though the formal holding of unconstitutionality was not made by this Court until after the arrests. That was the traditional rule. That is what the 1871 Congress intended. That is the rule under §1983. See *Smith v. Allwright*, 321 U. S. 649 (1944); *Lane v. Wilson*, 307 U. S. 268 (1939); *Nixon v. Herndon*, 273 U. S. 536 (1927); *Myers v. Anderson*, 238 U. S. 368 (1915). As this Court has said in interpreting section 1983, "it is immaterial whether [the state official's] conduct is legal or illegal as a matter of state law." *McNeese v. Board of Educ.*, 373 U. S. 668, 674 (1963).

The statute under which the police purported to act (though there was subsequently found to be no evidence under it against the ministers) is repugnant on its face to the Constitution, as this Court found. It makes it a crime to act peacefully and quietly, in the name of the Constitution, in a way that others may deem offensive. Who should bear the risk of the damages caused by arrest: the policemen who purport to make the arrest under such a repugnant statute or the person arrested? Congress in 1871 came down on the side of the person arrested.

ARGUMENT

I.

A police justice, who knowingly and intentionally acts individually and in concert with the police to punish persons for exercising their constitutional rights, to enforce segregation laws, customs and usages, and to convict persons under a statute of whose violation there was no evidence, is not immune from liability in damages under 42 U. S. C. §1983, which applies, without exception, to "every person", that was said by the Congress that enacted it to apply to such conduct by such judges, and that was intended to create a remedy for sham justice in the courts.

A. Neither the complaint nor this argument contends that Police Justice Spencer should be held liable merely because the statute under which he convicted petitioners was subsequently held unconstitutional, nor for any mere error in judgment.

The question, rather, is whether he should be immune from liability if any or all of the following facts can be shown: (a) he convicted petitioners in order to enforce Mississippi's segregation laws, customs, and usages, (b) he convicted petitioners of congregating with the intent of provoking a breach of the peace or under such circumstances that a breach of the peace might be occasioned thereby although there was no such evidence and without regard to whether or not there was such evidence, (c) he acted in concert with the police to punish persons who challenged Mississippi's segregation laws, customs and usages. The question, in other words, is whether a police justice should be immune if he acts knowingly and willfully

to deprive persons of, ~~the~~ constitutional rights, rights intended to be protected under Section 1983.

B. The statute, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, provides for no exceptions, no immunities. It applied to "any" person who under color of state law, etc., deprives "any" person of his federal constitutional or statutory rights.*

C. The legislative history of Section 1 of the Civil Rights Act of 1871 makes it clear that Congress intended to render liable state judges who under color of state law, etc., knowingly and willfully deprived persons of their constitutional rights.

The Congress was concerned not with protecting good judges or other public servants against having to face charges of wrongdoing but rather with defiance of law by mobs and by bad officials, including judges. Congress was concerned that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evi-

* As altered by the reviser who prepared the Revised Statutes of 1878 and as printed in 42 U. S. C., the statute refers to "every" person who deprives "any" person of his rights. "Every" is just as inclusive as "any", but the original parallelism of "any" in describing culprit and victim makes it even clearer that Congress did not intend *sub silentio* to grant immunity to judges who administer sham justice.

The reviser removed other language that textually made it even clearer that no such immunity was intended. As enacted, the section stated that any person shall be liable for depriving persons of their constitutional rights, etc., under color of state law, custom, etc., "*any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding.*" (Emphasis supplied to the words that were removed.)

The reviser lacked authority to alter law substantively. See Revised Statutes of the United States, 1878, Preface, p. 4; Appendix, pp. 1092-1093; 19 Stat. 268, ch. 82, §4, as amended by 20 Stat. 27, ch. 26. Title 42 has not been enacted into positive law.

dence of effective redress." * It was shocked at the record of many judges.** It was, indeed, the breakdown of justice that gave rise to the need for legislation. See generally *Monroe v. Pape*, 365 U. S. 167, 174-183, 235-236 (1961).

If it be said that it is harsh or unwise to subject the state judiciary to suits alleging that they knowingly and

* *Cong. Globe*, 42 Cong., 1st Sess. (Congressman Lowe of Kansas, 3/31/71, p. 374, col. 3).

** See, for example:

Senator Sherman of Ohio (summing up conference report): "Spreading terror and violence . . . now exist unchecked by punishment, independent of law, uncontrolled by magistrates." *Cong. Globe*, 42 Cong., 1st Sess., 4/19/71, p. 820, col. 2.

Congressman Rainey of South Carolina: "The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." *Id.*, 4/1/71, p. 394, col. 3.

Congressman Beatty of Ohio: "The remedy is needed because of 'prejudiced juries and bribed judges.'" *Id.*, 4/3/71, p. 429, col. 2.

Senator Osborn of Florida: "These men with hands stained with blood, hostile to every man who stood by his country during the war, determined by fair means or foul, that loyal men shall not remain in power, ought not to sit upon juries and administer the laws enacted to punish their own crimes." *Id.*, 4/13/71, p. 654, col. 2.

Congressman Garfield of Ohio: "Even where the laws are just and equal on their face, yet by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection." *Id.*, 4/4/71, App. p. 153, col. 3.

Congressman Porter of Virginia: "The outrages committed upon loyal men there are under forms of law." *Id.*, 4/4/71, App. p. 277, col.

Congressman Burchard of Illinois: "... if . . . in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction . . . the State has not afforded to all its citizens the equal protection of the laws." *Id.*, 4/6/71, p. 315, col. 1.

Senator Pratt of Indiana: "[The laws] only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." *Id.*, 4/6/71, p. 505, col. 3.

(Continued on the following page)

willfully acted to deprive a man of his civil rights, the simple answer is that Congress in 1871 intended harsh remedies to check bloody terror, stubborn defiance, abuse of legal process and sham justice.

As this Court has said in construing a civil rights act enacted one year before section 1983:

"... the history of the events from which [the statute] emerged illuminates the purpose and means of the statute with an unmistakable light. We think that history leaves no doubt that, if we are to give [the statute] the scope that its origins dictate, we must give it a sweep as broad as its language.

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"The purpose and scope of the [statute] must be viewed against the events and passions of the time."
United States v. Price, 383 U. S. 787, 801, 803 (1966).

A bloody civil war had been fought. After it, Congressmen calling themselves "radicals" took over. They acted in a radical fashion. They ousted state governments in the rebel states and installed military governments. They gave the Negro the vote. In the House they overwhelmingly voted to impeach President Johnson and then in the Senate came within one vote of the two-thirds majority necessary to oust him from office. In the field of justice they had given military governors law enforcement powers; they

Congressman Voorhees of Indiana: "The courts . . . fail and refuse to do their duty in the punishment of offenders against the law." *Id.*, 4/6/71, App. p. 179, col. 3.

See also the complaint of a Louisiana loyalist to Carl Schurz that "men who held commissions in the rebel army, who signed the ordinance of secession, . . . who took a leading part in the rebel movement" were acting as judges in the southern states. Quoted in Stampp, *The Era of Reconstruction, 1865-1877* (Knopf 1965) at p. 76.

had suspended the writ of habeas corpus, and they had denied this Court jurisdiction to hear appeals in habeas corpus cases. (*Ex parte McCordle*, 7 Wall. (74 U. S.) 506 (1868).) See generally, Stamp, *The Era of Reconstruction 1865-1877* (Knopf 1965).

After terror against and injustice to the newly freed black men and the loyalists spread in the South, Congress enacted the Civil Rights Act of 1871. Other sections of that Act were potentially far harsher than applying Section 1 to judges. See, e.g., Sections 3, 4, and 6.

All the members of Congress who spoke on the problem, explicitly stated that the section applied to judges. None disagreed. See *Cong. Globe*, 42d Cong., 1st Sess., 1871: Congressman Arthur of Kentucky, 3/31/71, p. 365, col. 3, p. 366, col. 1; Congressman Sheldon of Louisiana, 3/31/71, p. 368, col. 1; Congressman Lowe of Kansas, 3/31/71, p. 376, col. 1; Congressman Lewis of Kentucky, 4/1/71, p. 385, col. 1. Cf. Senator Thurman of Ohio, 4/13/71, p. 217, col. 1 (Appendix). And see *Monroe v. Pape*, *supra*, 365 U. S. at 233, n. 49.

The legislative history of Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, also supports the conclusion that the 1871 Congress did not intend silently to exempt state judges who knowingly and willfully deprived persons of their constitutional rights. It does so because (i) the similar terms of the earlier Act were specifically referred to as a guide to the 1871 Act by its principal sponsor, Congressman Shellabarger, when he introduced the 1871 Act, *Cong. Globe*, 42d Cong., 1st Sess., 1871, 3/28/71, p. 319, col. 3, printed in Appendix, p. 68, col. 1 (see also *Monroe v. Pape*, *supra*, 365 U. S. at 171) and (ii) the mood of the

earlier Congress casts light upon that of the later Congress. President Andrew Johnson vetoed the 1866 Act on the ground, among others, that it subjected state judges to criminal liability for depriving persons of their civil rights. Cong. Globe, 39th Cong., 1st Sess., 3/27/66, pp. 1679, 1780, col. 2. Congress re-enacted the Act over the President's veto and in so doing specifically stated that it intended that judges who knowingly used their office to deprive persons of their civil rights should be punished.*

D. The only case to examine any of the above legislative history, *Picking v. Pa. R. Co.*, 151 F. 2d 240 (3rd Cir. 1945), held that a state judge who knowingly violated a person's constitutional rights was not immune. See "Liability of Public Officers To Suit Under The Civil Rights Acts", 46 *Colum. L. Rev.* 614 (1946). See also *McShane v. Moldonan*, 172 F. 2d 1016 (6th Cir. 1949). Cf. *Viles v.*

* See Senator Trumbull of Illinois, Chairman of the Committee on the Judiciary, who led the successful effort to overrule the veto, at *id.*, 4/4/66, pp. 1758-59, *passim*, and in particular:

"But it is said that under this provision judges of the courts and ministerial officers who are engaged in the execution of any such statutes may be punished. . . . I admit that a ministerial official or a judge, if he acts corruptly or viciously or under color of an illegal act may be and ought to be punished. . . ."

"The assumption that State judges and other officials are not to be held responsible for violations of United States laws, when done under color of State statutes or customs, is akin to the maxim of the English law that the King can do no wrong. It places officials above the law. It is the very doctrine out of which the rebellion was hatched."

See also Senator Johnson of Virginia, *id.*, 4/5/66, p. 1778, col. 1; Senator Cowan of Pennsylvania, 4/5/66, p. 1783. Congressman Lawrence of Ohio, the only speaker on the subject in the House said:

"It is better to invade the judicial power of the State than permit it to invade, strike down, and destroy civil rights of citizens. . . ." *Id.*, 4/7/66, p. 1837, col. 1.

Symes, 129 F. 2d 828 (10th Cir. 1942); *Blackman v. Stone*, 101 F. 2d 500 (7th Cir. 1939); *Mitchell v. Greenough*, 100 F. 2d 184 (9th Cir. 1938); *Green v. Elbert*, 63 Fed. 308 (8th Cir. 1894). However, following this Court's holding in *Tenney v. Brandhove*, 341 U. S. 367 (1951), that state legislators are immune from suit under 42 U. S. C. §1983, several federal courts have held that it follows from *Tenney* that state judges are immune. None of those courts refer to the legislative history that shows the contrary.

But *Tenney*, even if it is regarded as correct, is distinguishable. Congress intended to cover judges, even if it did not intend to cover legislators. The statute on its face covers those who *act* under color of law, not those who *enact* laws.* The principal problem in 1871 was not legislation. It was intimidation and sham justice.

E. Judges are the essential cog in a system of sham justice, in the enforcement of segregation. Spencer and others like him are the very persons the 1871 Congress sought to make liable. So long as they are ready to mask the intention of the police to arrest persons for daring to challenge illegal segregation laws and customs by permitting the purported use of breach of the peace or disorderly conduct statutes, sham justice will win out. So here, Spencer stated that a citizen must always obey the police. The police knew from past experience that he could be relied upon to convict integrated groups who used the bus terminal. He convicted the ministers of a crime for

* See that distinction made explicit during the debate on the analogous provisions of Section 2 of the Civil Rights Act of 1866. *Cong. Globe*, 39th Cong., 1st Sess., 4/5/66, p. 1758, col. 1 (Senator Trumbull of Illinois). The United States Constitution itself mentions a legislative immunity, but no judicial immunity. Article 1, Section 6.

which there was no evidence. Petitioners should be permitted to prove that individually and in concert with the police Spencer willfully and knowingly sought to deprive them of their constitutional rights. Is it less than true to state that had the police not known that respondent Spencer would convict Petitioners, and others like them, who obeyed honorable religious scruples rather than time-worn illegal segregation customs, they probably would not have made these arrests?

F. In other contexts, it has been contended that it is good policy to exempt judges from suits based upon their official acts even though malice is alleged. See, *e.g.*, *Bradley v. Fisher*, 13 Wall. (80 U. S.) 375 (1871). The same reasons have been put forward to justify granting immunity to other public officials, *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949),* even those quite far removed from the pinnacles of responsibility, *Barr v. Matteo*, 360 U. S. 564, 572-574 (1959).** But, apart from policy, it surely is not unconstitutional for Congress to say that state judges should have to meet charges that they misused their office knowingly to deprive persons of their constitutional rights. That is what the 1871 Congress intended. That Congress sought not to protect good justices but to provide a remedy against sham justice.

* Judge Learned Hand, the writer of the opinion in *Gregoire*, thought that Section 1983 applied to judges. *Burt v. City of New York*, 156 F. 2d 791, 793 (2d Cir. 1946).

** Quite apart from the legislative history that shows that Congress did intend to cover state judges, one of the difficulties in carving out an exemption for judges is the lack of basis to distinguish between judges and other officials.

II.

All that there was by way of "plan and purpose" to be arrested was foreknowledge that traveling as an integrated group might illegally subject the ministers to arrest. State officials who act under color of state law to deprive persons of their constitutional rights are not freed from liability under 42 U. S. C. §1983 by showing that those persons know that they might be arrested for traveling as an integrated group but nevertheless exercised their constitutional right to do so.

A. Nothing in this case by way of "plan and purpose" other than foreknowledge that traveling as an integrated group might subject the members of the group to arrest has been shown. As admitted by the police and found by the court below, the ministers did nothing to initiate arrest other than to enter the bus terminal as an integrated group.* Foreknowledge that a reasonable chance existed that respondents would arrest and convict petitioners for

* The letters of petitioner Morris show that the ministers recognized (realistically) the possibility, indeed the likelihood, that they would be arrested because they were traveling as an integrated group (R. 167-182, 187-247). Plans were made on that assumption, including attention to bail and to the desirability of keeping some of the group out of potential arrest situations so that they could finish the pilgrimage and because bail money was limited. But from the outset those seeking martyrdom were asked not to apply (R. 177-178). And Morris, in his letters, hoped for legal changes that would mean "no jail—not because we aren't prepared to go, but so that the barrier might simply fall for the benefit of everyone" (R. 226). From the letters can also be gleaned the conviction that the jailing of ministers for traveling as an integrated group would constitute a "witness" that would help to demonstrate the commitment of the Church to justice and the evil of injustice. But knowledge that one's arrest might hasten the end of injustice coupled with willingness to face arrest does not render immune the person who in fact makes an illegal arrest.

no legitimate reason cannot be a basis for denying any liability on part of respondents to petitioners, any more than if instead of arresting petitioners, respondents had physically beaten them. In both cases illegal hands would have been laid upon the ministers, the only difference being those hands instead of doing violence, used less violent means but caused the incarceration of petitioners for several days, and in the case of Jones, whose bond money was slower in coming, for approximately twenty-one days. One might as well say that those who ended their days in Dachau shared the guilt with those who put them there, by remaining in Germany when everyone knew how vicious the Nazis were.

B. Under the decision of the court below, the more openly and notoriously defiant and contemptuous of the Constitution, the less likely that a state official will be held liable in damages for violating the Constitution. Under that theory, an official who goes on national television publicly to tear up the Constitution and announce that he will arrest and jail any black man seen walking with a white man ensures his freedom from damages for making such an arrest by the very publicity he gives to his illegal intent.*

Such a reward for defiance of law and order is repugnant. See *Cooper v. Aaron*, 358 U. S. 1, 16-19 (1958); *Buchanan v. Warley*, 245 U. S. 60, 81 (1917).** Surely a Congress

* Such a threat might in itself give rise to an action for damages under Section 1983 on behalf of those who could show that they were deterred from exercising their rights.

** This Court said in *Cooper*, 358 U. S. at 16: "The constitutional rights of respondents are not to be sacrificed or yielded to the

whose very reason for acting was that the Constitution and the laws of the United States were being openly and notoriously defied with the aim of deterring Negroes and their white allies from exercising their human and civil rights would not have intended to reward defiance of law and order.

C. The right that the ministers chose to exercise despite their knowledge that the police might arrest them was a constitutional right. In determining whether a person is a volunteer and therefore is not injured or has assumed a risk—both of which are of course merely labels for the conclusions that under the circumstances damages ought not to be recovered—it is relevant to consider not only the offensiveness of the conduct of the defendant but also the social and personal importance of the action of the plaintiff.

Under the common law of assumption of the risk or consent, a defendant who by his own wrong compels the plaintiff to choose between two evils is not permitted to say that the plaintiff is barred from recovery because he made the choice. Valuable legal rights need not be surrendered because the defendant has threatened the plaintiff with harm if he exercises the right. See *Restatement of Torts*, §496 E, comment e, and 496 B, comments e-j; *Prosser on Torts* (3rd ed.), pp. 465-466. Where amusement parks are involved, it is acceptable to say with Cardozo that "the timorous may stay at home." *Murphy v. Steeplechase*

violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.' *Buchanan v. Warley*, 245 U. S. 60, 81."

Amusement Co., 250 N. Y. 479, 483, 166 N. E. 173 (1929). Not so where constitutional rights are involved. Had the ministers not the right to hope that the police would not continue their illegal conduct; or if arrested that Judge Spencer would not convict? To believe otherwise is to accept evil indefinitely and to despair of hope for decency.

D. The "plan and purpose" defense proposed by the court below arises only after it has been found that the arrests were illegal. Congress in 1871 created a damage remedy primarily to help those who dared to assert their constitutional rights in the face of illegal efforts to maintain white supremacy and primarily to hold those who openly defied the Constitution and laws in order to preserve white supremacy. In other words, this case.

III.

A directed verdict on the issue of liability under 42 U. S. C. §1983 should be entered against the policemen defendants.

A. Putting aside, momentarily, the strong evidence of police bad faith, the question raised by respondents' cross-petition is whether Congress in 1871 intended to hold liable police officials who arrested persons under statutes subsequently held unconstitutional under the Federal Constitution.

At common law police officers were traditionally held liable for making warrantless arrests under statutes that subsequently were held unconstitutional. See Field, "The Effect of an Unconstitutional Statute in the Law of Public Officers: Liability of Officers for Action or Non-action," 77 U. Pa. L. Rev. 155, 177 (1928). There is no reason to

suppose that the 1871 Congress intended to change that rule? The language of Section 1983 is directly applicable. It makes federal rights supreme over state law, whether expressed in statute or custom. As this Court has said in interpreting Section 1983,

“ . . . it is immaterial whether [the state official’s] conduct is legal or illegal as a matter of state law.”
McNeese v. Board of Educ., 373 U. S. 668, 674 (1963).

B. This Court has assumed without question that a person harmed by a state official’s action taken under a state statute subsequently held unconstitutional may recover damages against that state official. See *Smith v. Allwright*, 321 U. S. 649 (1944); *Lane v. Wilson*, 307 U. S. 218 (1939); *Nixon v. Herndon*, 273 U. S. 536 (1927); *Myers v. Anderson*, 238 N. Y. 368 (1915). Voting rights were involved in those cases but the principle stands without regard to the particular nature of the case. Were there any difference, it is that Section 1983 more clearly gives the damage remedy to the person arrested under a state statute subsequently held repugnant to the Federal Constitution than it does in voting cases. The Civil Rights Act of 1871 grew out of concern with the maladministration of justice, not interference with the right to vote.

C. Respondents complain of the harshness of holding liable policemen because the state statute under which they purported to act was subsequently held unconstitutional. But freeing such policemen from liability also is harsh—harsh on the person arrested unconstitutionally who would not be made whole for the harm done on account of the unconstitutional arrest.

Furthermore, enforcing a statute subsequently held unconstitutional is not necessarily an innocent act, certainly not in the case before us. Is it really so surprising that the state should not make criminal those who, peacefully, quietly, and without any threat or inconvenience to others, act, in the name of the Constitution, in a way that others may deem offensive? See *Nesmith v. Alford*, 318 F. 2d 110, 121 (5th Cir. 1963). Was it not obvious that the police should make some effort to calm or caution the supposedly "ugly crowd" (or those mumbling in the distance)? In any event, Section 1983 cuts through such questions. The reliance here was not innocent reliance upon a statute later found to be unconstitutional, but rather upon the expectation that Police Justice Spencer would convict. The convictions were reversed not upon grounds of unconstitutionality of the statute, but because there were no grounds for that arrest under the statute.

The policemen who acted unconstitutionally under a state law are liable whether the holding of unconstitutionality comes sooner or later. The 1871 Congress came down on the side of the person whose constitutional rights were taken away.

IV.

The evidence that the police used the "disorderly conduct" statute as a sham basis for the arrest, the real aim of which was to preserve segregation, was strong. The court below, therefore, erred in dismissing the diversity cause of action.

Even if it is the law in Mississippi (contrary to most jurisdictions) that a policeman is not liable for false arrest merely because the statute under which he made an arrest was subsequently held unconstitutional, the court below erred in concluding that the diversity cause of action should consequently be dismissed.

In the first place, there is the question whether the finding by the County Court at the trial *de novo* that there was *no* evidence against the ministers under the "disorderly conduct" statute renders the police liable without further inquiry. In no way does the diversity cause of action hinge upon the unconstitutionality of the statute, and it was error for the Fifth Circuit to assume so. At the trial *de novo* the complaint was dismissed, not upon the credibility of each side's evidence at the end of the case, but upon the fact that there was no evidence showing a violation of the statute. Since the trial before Judge Mize was tainted by prejudicial improperly admitted evidence warranting reversal, the jury verdict for respondents in no way affects this issue.

Ample support is in the record from which a jury could find that the police used the "disorderly conduct" statute as a sham basis for the arrests, the real purpose which was to enforce segregation law and custom. The police conceded that the ministers were orderly. The ministers'

testimony was that there was no threat from others in the waiting room. The police testimony to the contrary was weak and conflicting, reduced under pressure to statements that a few persons were mumbling. The police admitted that they made no effort to calm, caution or restrain such persons. Indeed, the police stopped the ministers from entering a restaurant where, at least as far as the record shows, there were no such persons. The waiting room was, by "order of the police" posted for whites only. No Negro had entered without being arrested. The police thought it was wrong for whites and Negroes to be together in bus stations or anywhere else.

Even *Golden v. Thompson*, 194 Miss. 241, 11 So. 2d 906 (1943), cited by the court below to justify its dismissal of the diversity cause of action, requires that the police at least act "in good faith in reliance" on the statute subsequently held unconstitutional. In the case before this Court all testimony points not to reliance upon the constitutionality of the statute, but upon a compulsion to preserve unlimited segregation as the custom of Mississippi, and to use the full power of the law to do so. Even subsequent to reversal at the trial *de novo* for lack of evidence we have the testimony of the police that the arrests would have been made again.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be

- (1) reversed in so far as it dismisses the cause of action under 42 U. S. C. §1983 against Police Justice Spencer, and such cause of action should be remanded to the trial court for a new trial;

(2) modified in so far as it orders a new trial for the policemen defendants with respect to the cause of action under 42 U. S. C. §1983, so as on the new trial (a) to eliminate any immunity based upon the fact that petitioners knew they might be arrested for traveling as an integrated group, and (b) order a directed verdict on the issue of liability;

(3) reversed in so far as it dismissed the diversity cause of action against the policemen defendants which cause of action should be remanded and an order to direct a verdict for petitioners should issue, or at the least, a new trial.

Respectfully submitted,

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